

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BILLY HOWARD,

Plaintiff,

v.

KERN COUNTY LERDO FACILITY
NURSING STAFF,

Defendants.

Case No. 1:21-cv-00931-JLT-CDB (PC)

**ORDER GRANTING PLAINTIFF 90 DAYS
TO IDENTIFY JANE DOES**

Plaintiff Billy Howard is a state prisoner proceeding *pro se* and *in forma pauperis* in this civil rights action brought pursuant to 42 U.S.C. § 1983.

I. RELEVANT BACKGROUND

Plaintiff initiated this action with the filing of his complaint on June 14, 2021. (Doc. 1.) Plaintiff indicated he did not know the identities of any of the parties; he named all as Doe defendants. (*Id.*)

In a First Screening Order issued November 10, 2022, the Court found Plaintiff had stated cognizable claims for a deliberate indifference to serious medical needs against the Kern County Lerdo facility nursing staff defendants. (Doc. 16 at 6-7.) Additionally, the Court found Plaintiff had not stated a cognizable claim against the chief medical director of the facility. (*Id.* at 7.) Plaintiff was afforded the opportunity to (1) file written notice that he did not wish to file a first amended complaint and was willing to proceed only on his claims for deliberate indifference to

1 serious medical needs against the facility nursing staff defendants only; or (2) file a first amended
2 complaint curing the deficiencies identified in the screening order; or (3) file a notice of voluntary
3 dismissal. (*Id.* at 8-9.)

4 On December 1, 2022, Plaintiff filed written notice with this Court, indicating a wish “to
5 push forward with the original proceedings without [amendments].” (Doc. 17.)

6 On December 5, 2022, the undersigned issued Findings and Recommendations to Dismiss
7 Claims and Defendant. (Doc. 19.) Specifically, it was recommended that Doe Defendant Chief
8 Medical Director be dismissed from the action, and that the claims in Plaintiff’s complaint be
9 dismissed, except for the deliberate indifference to serious medical needs claims against facility
10 nursing staff. (*Id.* at 2.) Plaintiff was afforded 14 days within which to file any objections. (*Id.*)
11 No objections were filed.

12 On December 28, 2022, District Judge Jennifer L. Thurston issued an Order Adopting
13 Findings and Recommendations Dismissing the Claim Against Defendant Kern County Lerdo
14 Facility Medical Chief and Directing the Clerk of the Court to Update the Docket. (Doc. 20.)
15 More particularly, the Kern County Lerdo Facility Medical Chief was dismissed as a defendant,
16 the Clerk of the Court was directed to terminate that individual as a defendant, and the action was
17 to proceed upon Plaintiff’s claim of deliberate indifference to serious medical needs against
18 facility nursing staff. (*Id.* at 2.)

19 The undersigned addresses herein Plaintiff’s need to identify the Kern County Lerdo
20 facility nursing staff defendants against whom his deliberate indifference to serious medical needs
21 claims proceed.

22 **II. DISCUSSION**

23 The facility nursing staff defendants are presently unknown to Plaintiff. He indicated as
24 much in his original complaint. It appears from the original complaint that there may be as many
25 as four separate individuals comprising the group the Court has identified as the facility nursing
26 defendants. In the First Screening Order, the Court noted approximately four encounters between
27 Plaintiff and the facility nursing staff: (1) the first encounter on December 10, 2020 when
28 Plaintiff was “seen by a nurse;” (2) the second encounter a few days later “with an unidentified

1 nurse;" (3) one week later, in a third encounter, when Plaintiff advised "the nurse" of his
2 worsening condition; and (4) a final, fourth encounter on or about January 4, 2021 when "an
3 unidentified nurse" dismissed the severity of his condition and concerns after Plaintiff "went
4 man down." (See Doc. 16 at 4.) Thus, while Plaintiff is attempting to identify these unknown
5 individuals, he shall be prepared to identify Jane Does 1 through 4 by their true names following
6 limited discovery.

7 As previously noted, this action proceeds against the facility nursing staff defendants only
8 on a deliberate indifference to serious medical needs claim. (Docs. 19 & 20.) Although Plaintiff
9 has stated a plausible claim against the facility nursing staff defendants, the Court will not require
10 service on these defendants at this time. The Ninth Circuit has held that where identity is
11 unknown prior to the filing of a complaint, the plaintiff should be given an opportunity through
12 discovery to identify the unknown defendants unless it is clear that discovery would not uncover
13 the identities, or that the complaint would be dismissed on other grounds. *Wakefield v. Thompson*,
14 177 F.3d 1160, 1163 (9th Cir. 1999) (citing *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir.
15 1980)). Here, it is unclear whether discovery will uncover the identities of the facility nursing
16 staff defendants, nor it is clear that Plaintiff's complaint would be dismissed on other grounds.
17 Thus, Plaintiff should be afforded an opportunity to discover the facility nursing staff defendants'
18 identities through limited discovery.

19 Rule 45 of the Federal Rules of Civil Procedure concerns subpoenas. Plaintiff is advised
20 the Court's authorization of a subpoena duces tecum requested by an *in forma pauperis* plaintiff
21 is subject to limitations. Because personal service of a subpoena duces tecum is required (Fed. R.
22 Civ. P. 45(b)), "[d]irecting the Marshal's Office to expend its resources personally serving a
23 subpoena is not taken lightly by the court. *Austin v. Winett*, No. 1:04-cv-05104-DLB PC, 2008
24 WL 5213414, *1 (E.D. Cal. Dec. 12, 2008); 28 U.S.C § 1915(d). Limitations include the
25 relevance of the information sought, as well as the burden and expense to the non-party in
26 providing the requested information. Fed. R. Civ. P. 26, 45.

27 A motion for issuance of a subpoena duces tecum should be supported by clear
28 identification of the documents sought and a showing that the records are obtainable only through

1 the identified third party. See, e.g., *Davis v. Ramen*, No. 1:06-cv-01216-AWI-SKO (PC), 2010
2 WL 1948560, *1 (E.D. Cal. May 11, 2010); *Williams v. Adams*, No. 1:05-cv-00124-AWI-SMS
3 (PC), 2010 WL 148703, *1 (E.D. Cal. Jan. 14, 2010). The “Federal Rules of Civil Procedure were
4 not intended to burden a non-party with a duty to suffer excessive or unusual expenses in order to
5 comply with a subpoena duces tecum.” *Badman v. Stark*, 139 F.R.D. 601, 605 (M.D. Pa. 1991).
6 Non-parties are “entitled to have the benefit of the Court’s vigilance” in considering these factors.
7 *Id.*

III. CONCLUSION AND ORDER

9 Accordingly, the Court GRANTS Plaintiff 90 days from the date of service of this Order
10 within which to discover the names of the facility nursing staff defendants, or Jane Does 1
11 through 4, through subpoena or otherwise, and to substitute these defendants' actual names by
12 filing a "notice of substitution." *See Wakefield*, 177 F.3d at 1163. If, within 90 days, Plaintiff fails
13 to file a notice of substitution that provides the actual names of the Jane Does, the Court will
14 recommend dismissal of this action without prejudice.

15 || IT IS SO ORDERED.

Dated: **January 4, 2023**



UNITED STATES MAGISTRATE JUDGE